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No. 06-593

IN THE
Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE

Petitioners

- v. -

EVELYN COKE

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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RULE 29.6 STATEMENT

This statement is submitted pursuant to Rule 29.6.

National Association for Home Care & Hospice, Inc. ("NAHC") is a not-for-profit organization incorporated under the laws of the District of Columbia. NAHC states that it has no parent corporation and no publicly held corporation owns any of its stock.

INTEREST OF THE AMICUS CURIAE

The National Association for Home Care & Hospice, Inc. (NAHC) is a not for profit trade association representing the interests of nearly 6,000 home and community based health care providers throughout the nation. NAHC submits this amicus[1] curiae brief in support of the Petitioners regarding the decision of the United States Court of Appeals for the Second Circuit in *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 462 F.3d 48 (2nd Cir. 2006).[2]

NAHC has directly participated in legislative and regulatory matters involved in the companionship services exemption under the Wage & Hour law of the Fair Labor Standards Act that is at issue in this matter. NAHC members across the United States and the millions of individuals who receive their services face a risk of severe adverse impact through the Court of Appeals decision.

The Second Circuit's decision poses a risk to the continued viability of home care services, raising costs for home care providers, increasing reimbursement obligations for government and private third-party payers, forcing undesired limits on the working hours of caregivers, and impeding access to the care settings of choice for millions of elderly and disabled citizens.

NAHC urges this Court to reverse the decision below.

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[1] *Amicus* certifies that this brief was authored in whole by Counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No other person of entity made any monetary contribution to the preparation or submission of this brief.

[2] All parties have consented in writing to the filing of this brief. Copies of the written consents have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Home care is a vital resource that allows infirm and disabled individuals of all ages to remain in their own homes, outside of a costly institutional care setting. Companionship services is one crucial component of home care. Persons receiving companionship services come in all age categories and degrees of disability.

The home care delivery system essentially controls the determination as to whether "companionship services" are accessible to consumers directly or through entities. That system, rather than the marketplace, determines whether the care recipient in the home acts or can act as the employer of the individual providing the companionship services. Licensing and funding sources, particularly government-based programs, significantly impact on the service delivery mode with most establishing an employer role in the entity authorized to supply the services rather than permitting the direct consumer to take on that role.

The ruling of the Second Circuit should be understood as creating a standard that will discriminate against the elderly and infirm who either must rely upon government-based care financing or who live in states where quality of care is enhanced through licensing standards. It also will discriminate against those that cannot mentally or physically undertake the responsibilities of being an employer. The ruling will increase costs for Medicare, Medicaid, and other government programs while encouraging consumers to acquire care outside the established standards of quality to save on overtime compensation.

The Court of Appeals failed to apply basic tenets of administrative law, including its erroneous reading of the statutory language itself in finding 29 CFR §552.109(a) unenforceable. In focusing on the regulatory definitions

of "domestic services" at 29 C.F.R. §552.3, the Court of Appeals neglected to evaluate the meaning of the term "any employee" under 29 U.S.C. §213(a)(15). The analysis of 552.109(a) should have ended with the unambiguous language of the statute.

The Secretary's original rulemaking effort recognizes this distinction.

Congress well understood how to draft statutory language that narrowed the concept of domestic service in the manner necessary to exclude application to third-party employment of domestic service employees if it so desired. Congress enacted provisions in the Social Security Act and the Internal Revenue Code that limited to domestic services "*in the home of the employer*." It is apparent that Congress understood the concept of "domestic services" to relate solely to the nature of the employee's activities.

In addition, the time-honored and well-developed processes for promulgating administrative rules also are essentially disregarded by the Court of Appeals in this matter. As a participant in these and many other rulemaking efforts, Amicus is greatly concerned about the potential impact that the Court's action may have. This Court and lower courts throughout the land have routinely emphasized the critical importance of the rulemaking process to the accuracy and reliability of governance. Great deference should be given to the Secretary in promulgating 552.109 through extensive rulemaking efforts.

The rulemaking process allows the administrative agency to display its expertise while allowing all interested parties to participate in that deliberative process. To ignore that process with 552.109 is an affront to all rulemaking. Section 552.109 is a reasonable and rational approach to achieve the goals of the companionship services exemption. By focusing on the

infirm and elderly in enacting a companionship services exemption, Congress targets our nation's most vulnerable population.

The point of the companionship services exemption is to assist the infirm and elderly in getting care because Congress recognized their special needs. This provision is designed to protect the consumer from high costs, not to protect the employer from higher wage obligations.

The Secretary's construction of section 213(a)(15) also avoids the very troubling discriminatory result if this exemption applies only to directly-employed caregivers. Such discrimination would be at odds with repeated efforts by Congress and the Executive Branch to end disability-based barriers. Accordingly, even applying only the slightest level of deference to the Secretary, 552.109(a) is a permissible construction of the FLSA.

ARGUMENT

A. COMPANIONSHIP SERVICES IS AN ESSENTIAL SERVICE IN CARING FOR THE ELDERLY AND INFIRM IN THEIR OWN HOMES.

The matter before the Court concerns the correct interpretation and application of the "companionship services" exemption under the Fair Labor Standards Act of 1974. However, to fully understand the issue, "companionship services" must be placed in the context of the elaborate and complex system in which those services are provided. Home care is that system.

Home care in the United States has one common thread – it is a vital resource that allows infirm and disabled individuals of all ages to remain in their own homes, outside of a costly institutional care setting.

Companionship services is one crucial component of home care in that it is the means by which the individual meets their ongoing personal care needs. 29 C.F.R. §552.6 (personal care is within the definition of "companionship services").

Persons receiving companionship services come in all age categories and degrees of disability. "Basic Statistics About Home Care," National Association for Home Care & Hospice, Inc. (2004, http://www.nahc.org/04HC_Stats.pdf. The primary recipient of the service is elderly with chronic infirmities that compromise the person's ability to perform his own activities of daily living such as personal hygiene, ambulation, feeding, and transfers. The disabilities are caused by a variety of illnesses including Parkinson's Disease, Chronic Obstructive Pulmonary Disease, Multiple Sclerosis, Diabetes, Cardiac Insufficiency, and Hypertension.

Necessary personal care services are provided by family members, friends, and unrelated caregivers. Services may be provided without cost or for compensation. When involving paid caregivers, the nature of the provider is often tied to the nature of the funding. Medicare and Medicaid supply significant financing for personal care services with a broad variety of programs.

Under Medicare, personal care services are covered under the "home health services" benefit under the label of "home health aide" services. 42 U.S.C. §§ 1395f(a)(2)(c); 1395x(m)(4); 42 CFR § 409.45(b). In 2005, approximately 2.8 million Medicare beneficiaries received home health services, including an estimated 10 million home health aide visits. These services must be provided by home health agencies that meet stringent "conditions of participation," 42 U.S.C. §1395x(o); 42 CFR Part 484. Among the relevant conditions, home health aide services

must be provided under the supervision of a nurse by persons who meet certain training and competency standards. 42 USC § 1395bbb(a)(3)(A); 42 CFR § 484.36.

Medicaid home- and community-based care programs vary widely by state. All states offer a "home health services" benefit that includes skilled nursing and home health aide services. 42 USC § 1396a(a)(10)(D). These services must be provided by an entity that meets Medicare conditions of participation as a "home health agency." 42 CFR § 440.70(d). In addition, states have the option to provide further home care services under the Personal Care Service and Home and Community Based Services benefits. 42 CFR §§ 440.167; 440.180. Finally, states can devise programs under broad waiver authority that provide home care as an alternative to more costly institutional care. 42 USC §§ 1396n(c); 1396n(d); *see, Olmstead v. L.C.*, 527 US 581 (1999). All the states have one or more of these so-called "waiver" programs that provide personal care support to the disabled and elderly in their own homes.

With Medicaid home care programs, other than the "home health services" benefit, the state determines the nature and qualifications of the providers of care. In most cases the provider is an entity that meets state-outlined organizational and quality standards. These entities also act as the employer of personal care attendants/home care aides. Alternatively, states offer Medicaid coverage of personal care services through the use of individual providers wherein the Medicaid beneficiary selects and services the caregiver. A broad variety of delivery systems have developed to operate with an "individual provider" benefit mode. These include arrangements where state or local government manage the workforce for the Medicaid beneficiary population, taking on elements of the employer role, but not acting as an employer in the comprehensive sense.

See, e.g., California In-Home Supportive Services, http://dss.cahwnet.gov/cdssweb/In-HomeSup_173.htm. Still other delivery methods have the state contracting with a fiscal agent that manages such functions as recruitment, training, and payroll with the Medicaid beneficiary responsible for selecting the caregiver and managing the caregiver's actions in the home. See, e.g., 8.315.4 NMAC (New Mexico Administrative Code). Finally, some states offer "cash and counseling" programs that provide the Medicaid beneficiary with financial support towards the purchase of personal care services in whatever mode is chosen by the beneficiary.

Beyond government-based financing, home care services can be purchased by the consumer with their own private funds. These services are available through home care agencies, care registries, and individual providers. The availability and makeup of these providers depends, in part, on the licensing requirements in the specific state. These standards are nearly endless in their variety and variations. Some states have no licensing requirements. Others require licensing of agencies, registries, and individuals providing care in the home. Still others only license home care agencies, but not other forms of personal care delivery.

The nature of the care provider in a given government program generally reflects a decision of that program relating to the depth of quality of care controls. Similarly, state decisions on licensing indicate a choice of quality of care standards. Whether based on financing or licensing standards, there are stronger quality of care standards in an agency mode of delivery than an individual provider mode.

The home care delivery system essentially controls the determination as to whether "companionship services" are accessible to consumers directly or through entities. That system, rather than the marketplace,

determines whether the care recipient in the home acts or can act as the employer of the individual providing the companionship services. Licensing and funding sources, particularly government-based programs, significantly impact on the service delivery mode with most establishing an employer role in the entity authorized to supply the services rather than permitting the direct consumer to take on that role.

In this context, the ruling of the Second Circuit must be understood as creating a standard for minimum wage and overtime compensation under the Fair Labor Standards Act that will discriminate against the elderly and infirm who either must rely upon government-based care financing or who live in states where quality of care is enhanced through licensing standards. It is a ruling that gives purchase cost advantages to those with sufficient personal financial resources to secure care through hiring their own employees. The ruling will impede access to home care by increasing costs for Medicare, Medicaid, and other government programs while encouraging consumers to acquire care outside the established standards of quality to save on overtime compensation. Congress, in trying to help the infirm and elderly with personal care needs, did not intend this result when it enacted the companionship services exemption.

B. THE COMPANIONSHIP SERVICES EXEMPTION UNDER THE LANGUAGE OF THE FLSA AUTHORIZES ITS APPLICATION TO ALL EMPLOYERS.

At the center of this case is whether the Fair Labor Standards Act of 1974 permits the application of the companionship services exemption under 29 U.S.C. §213(a)(15) to individuals employed by third-party

employers. The Court of Appeals for the Second Circuit held that it did not, finding the regulation expressing such, 29 C.F.R. §552.109, to be unenforceable. In doing so, the Court of Appeals failed to apply basic tenets of administrative law, including its erroneous reading of the statutory language itself.

The entirety of the companionship services exemption is found at 29 U.S.C. §213(a)(15), which applies the exemption to:

> " . . any employee employed on a casual basis in domestic services employment to provide babysitting services or any employee employed in domestic services employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

To determine the meaning of an enactment of Congress, the judiciary must first consider the language of the statutory provision itself. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 842 (1984). If the language is unambiguous, that is the end of the inquiry. Chevron, 467 US at 842-843. The Court of Appeals apparently found the language to be ambiguous because such terms as "domestic services" and "companionship services" were not defined. Pet. Ap. 2a (Coke II, "we adhere to our original position"); Pet. Ap. 17a, 23a-24a (Coke II, Court moves to Chevron Step 2 analysis without addressing statutory language). In doing so, the Court of Appeals proceeded to the second step in the Chevron standard for statutory interpretation prematurely.

The Court of Appeals found ambiguity in the statutory language not in the language itself, but rather in the regulations promulgated by the Secretary pursuant to 29 U.S.C. §213(a)(15). In particular, the Court of Appeals focused on the claimed inconsistency between the definition of domestic services in 29 C.F.R. §552.3 and the applicability of the companionship services exemption to third-party employment in 29 C.F.R. §552.109. Pet. Ap. 5a However, in the Chevron Step 1 analysis, ambiguity in the statutory language must have genesis in that language, not implementing regulations. *Chevron*, 467 US at 842.

In focusing on the regulatory definitions of "domestic services" at 29 C.F.R. §552.3, the Court of Appeals neglected to evaluate the meaning of the term "any employee." Without a doubt, the affected "employee" is limited to those in the employment category of domestic service and its subcategory of companionship services. However, the language of section 213(a)(15) does not further condition the application of the exemption solely to those persons employed by the individual receiving the services. Rather than raise questions regarding the validity of applying the exemption to third-party employment, the language of the statute raises question as to the validity of the Secretary's definition of "domestic services" as interpreted by the Court of Appeals.

The Secretary's original rulemaking effort recognizes the distinction between the definitions of "employee" and "domestic services" under 29 U.S.C. §213(a)(15). In revising its proposed rule to account for this distinction relative to 29 C.F.R. §552.109(a), the Secretary states that the exemption "can be available" to such third party employers since it applies to "any employee" engaged "in" the enumerated services. 40 Fed. Reg. 7404, 7405 (1975). The Secretary further states that

this derivation "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions. 40 Fed. Reg. at 7405.

In 1974, the Congress well understood how to draft statutory language that narrowed the concept of domestic service in the manner necessary to exclude application to third-party employment of domestic service employees. In fact, Congress expressed clear awareness of a recently enacted provision in the Social Security Act that contained this language when deliberating the companionship services exemption to the Fair Labor Standards Act. S.Rep. No. 93-690, 93rd Congress, 2d Session at 18. ("This bill would bring under minimum wage and overtime provisions of the Act all employees in private household domestic service earning "wages" ($50 per quarter) for purposes of the Social Security Act, but retains a minimum wage and overtime exemption for...companions...").

Under Public Law 92-5 (March 17, 1971), Congress expanded the application of the Social Security program to domestic services, but specifically excluded taxing wages from a certain subclass of domestic services. Specifically excluded is:

> "(6)(A) Remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;
>
> (B) Cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such

> service is less than the applicable dollar threshold (as defined in section 3121(x) of the Internal Revenue Code of 1986) for such year;
>
> (C) Cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this paragraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in section 210(f)(5); . . . ."

42 U.S.C. §209(a)(6). (Emphasis added.)

Consistent with this statutory language, implementing regulations distinguish the nature of domestic services from the identity of the employer. Under 20 C.F.R. §404.1057(b), domestic services "is work of a household nature" including such services as those performed by cooks, waiters, butlers, maids, and housekeepers. It does not include services performed as a private secretary, tutor, or librarian, even though performed in the employer's home." 42 C.F.R. §404.1057(b).

The Congressional awareness of language necessary to limit application of provisions of law related to domestic services in the home of the employer is further found in the Internal Revenue Code. The tax code is replete with references to "domestic service in a private home of the employer" as distinguished from the more general concept

of "domestic services." *See, e.g.*, 26 U.S.C. §§3510(c); 3121; 3306; 3401; and 3102. Unlike the tax code, the FLSA contains no comparable qualification.

It is apparent that Congress understood the concept of "domestic services" to relate solely to the nature of the employee's activities. Further qualifications such as location ("in a private home") and the identity of the employer ("...of the employer") are necessary to establish intended limitations. The Court of Appeals' attempt to include and limit the identity of the employer in the application of the companionship services exemption overextends the reach of the concept of "domestic services" under 29 U.S.C. §213(a)(15).

It would be wholly illogical and inconsistent for Congress to intend different definitions of the same employment category, "domestic services," under the Fair Labor Standards Act, the Social Security Act, and the Internal Revenue Code. *Barnhart v. Walton*, 535 US 212, 221 (2002) (The same statutory words should not be interpreted differently in closely related contexts); citing, *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 US 332 (1994). It is plain that Congress was aware of the language needed to quality and limit the category of employer for the companionship services exemption in 1974. Congress did not so limit its application to a distinct set of employers under the FLSA. The inquiry should end there.

C. SECTION 552.109(a) IS ENTITLED TO DEFERENCE.

Amicus is mindful that its brief should not be a vehicle for arguments repetitive of those made by Petitioner. Supreme Court Rule 37.1. As such, the principles and tenets of administrative law will not be

recited herein as the Court will assuredly have received such in detail from the parties. It can surely be expected that both parties will exhaust all necessary discussion of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); and *United States v. Mead Corp.*, 533 U.S. 218 (2001), as well as their progeny before this Court and lower courts. Instead, Amicus will focus on two elements that demonstrate that deference to the Department of Labor's interpretation and application of the companionship services exemption under 29 U.S.C. §213(a)(15) is well warranted.

In the preceding section of this brief, Amicus advanced the argument that the language of 29 U.S.C. §213(a)(15) is sufficiently clear to avoid concern over whether, and at what level, deference should be afforded the administration's rule at 29 C.F.R. §552.109 regarding application of the companionship services exemption to third-party employment. That language, and that of other relevant statutes, strongly demonstrates that the Court of Appeals improperly focused on the definition of "domestic services" to the exclusion of the reference to "any employee." However, in the event that this Court does not share that view, Amicus offers the following justification for deference to the rule promulgated by the Secretary.

1. The Repeated Use of Comprehensive Rulemaking Warrants Deference Where the Secretary Is Authorized to Issue Binding Rules.

The time-honored and well-developed processes for promulgating administrative rules is essentially disregarded by the Court of Appeals in this matter. While there is undeniable authority of the Secretary of

Labor to promulgate binding rules in implementing the companionship services exemption under 29 U.S.C. §213(a)(15), ("as such terms are defined and delimited by regulations of the Secretary"), the Court of Appeals fails to offer even a courteous nod to the resulting rulemaking. Pet. Ap. At 27a (the notice-and-comment procedure for 552.109(a) was "at best idiosyncratic and at worst insufficient"). Instead, the court ignores multiple rulemaking efforts because the rule at issue is located under the label of "Interpretations." Pet. Ap. at 3a. (552.109(a) is an interpretive rule because it is located in 552 Subpart B).

As a participant in these and many other rulemaking efforts, Amicus is greatly concerned about the potential impact that the Court's action may have. In this matter alone, millions of infirm and elderly citizens who require and receive personal care in their own homes are affected. In addition, the federal and state programs that fund much of this care also are implicated. Finally, thousands of businesses and their employers are drawn into a litigation fray through one person before one court. Brief of National Association for Home Care & Hospice, Inc. as Amicus Curiae In Support of Petition for a Writ of Certiorari at 4-5.

The result is that the Court of Appeals has substituted its view of the law over that of the federal agency charged with implementing and enforcing that law. More importantly, the court has rejected a process that begins with the expertise of the administrative agency in devising a proposed rule, requires intensive evaluation and analysis by that agency to justify its rule, permits any interested member of the public to review and comment on its proposed rule, and results in a final rule that is made known to all affected parties in an open and accessible manner. The Court of Appeals' cavalier disregard of this process is an offense to Congress and the

public at large. It also serves to severely damage the future credibility of the rulemaking process.

This Court and lower courts throughout the land have routinely emphasized the critical importance of the rulemaking process to the accuracy and reliability of governance. *United States v. Mead Corporation*, 533 US 218, 230 (2001) ("the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudications") (citations omitted). Congress has established and strengthened the rulemaking process over the years to achieve accountability. *See, e.g.*, Administrative Procedures Act, 5 USC 552 *et seq.*; Small Business Regulatory Enforcement Fairness Act of 1996, 5 USC 801 *et seq.*; Regulatory Flexibility Act, 5 U.S.C. §601 *et seq.* These processes were used not once, but multiple times by the Secretary regarding the companionship services exemption, yet the Court of Appeals gave not a shred of deference to the process in holding that 29 C.F.R. §552.109 is unenforceable.

The greatest irony in this case is that the rulemaking process worked. Upon receiving numerous comments from interested federal and state agencies, consumer representatives, workers and their representatives, and employers and their representatives, the Department of Labor multiple times reached the same conclusion: third-party employment is included within the companionship services exemption. 39 Fed. Reg. 35382 (1974); 40 Fed. Reg. 7404 (1975); 58 Fed. Reg. 69310 (1973); 60 Fed. Reg. 46798 (1995); 66 Fed. Reg. 5485 (2001); and 67 Fed. Reg. 16668 (2002). However, instead of recognizing that the rulemaking process did its job, the Court of Appeals criticizes the Secretary because the final rule is not consistent with the proposed rule.

Pet. Ap. 5a3. If the validity of a final rule is to be measure by its consistency with the proposed rule, there is no reason to require public notice and opportunity to comment. The agency should simply publish its final rule without the "fruits" of notice-and-comment rulemaking. *United States v. Mead*, 533 at 230 (2001) ('a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force"). The rulemaking process allows the administrative agency to display its expertise while allowing all interested parties to participate in that deliberative process. To ignore that process with 552.109 is an affront to all rulemaking.

The Court of Appeals discounts the grant of any deference to the rulemaking process in part because it concludes that section 552.109 is not intended to be legally binding. Pet. Ap. 3a-4a. However, the language in the rulemaking, the clear statements of the Department, and the post hoc actions of Congress indicate otherwise.

There should be no dispute that Congress authorized the Secretary to promulgate legally binding rules to implement the companionship services exemption. The direct authorization to "defin[e] and delimi[t] by regulations" the scope of the exemption is significant. *Auer v. Robbins*, 519 US 452, 456 (1997) (finding identical language under Section 213(a)(1) of the

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[3] To the extent that the Secretary's rulemaking expresses inconsistency, the indications are that the Secretary would be inconsistent if she excluded third-party employment from the companionship services exemption. As noted in the debate concerning the 1974 amendments to the FLSA, the Labor Department's concept of a domestic service worker at the time included both persons employed by a member of the household and employed by "a household service business whose services have been requested by a member of the household occupying that residence." 119 Cong. Rec. 24796 (July 19, 1973) (statement of Senator Dominick).

FLSA provides such authority). The "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings" is a "very good indicator of delegation meriting *Chevron* treatment." *United States v. Mead*, 533 US 218, 229 (2001).

In the original proposed rule, 39 Fed. Reg. 35382 (October 1, 1974), the Secretary stated, without qualification or limitation, that the

> "amendments and additions are proposed pursuant to authority in sections 11(c) and 13(a)(15) of the Fair Labor Standards Act, as amended . . . ."

The original final rule was issued just a few months later on February 20, 1975, 40 Fed. Reg. 7404. With respect to numerous elements of the "Interpretations" part of 29 C.F.R. §552, the Secretary conveyed the intention that said rules are legally binding. For example, section 552.100(b) was revised to make it clear that employers cannot credit against wages for the cost of uniforms and their care if they required that the uniforms be worn. 40 Fed. Reg. at 7404 (emphasis added). Similarly, the modification to §552.102(b) "permits the employee's hours to be established by an agreement." Id. (emphasis added).

With respect to the rule at issue in this matter, section 552.109, the Secretary states that the proposed rule "would not have allowed" application of the companionship services exemption to third-party employment. The final rule, on the other hand, establishes that "these exemptions can be available" to such third-party employers. Id. at 7405. These words and phrases connote terms of a binding nature.

The Secretary has made it clear that it intends section 552.109 to be legally binding on employers and employees. *See*, Pet. Ap. 50a-64a at 63a. Department of Labor Wage and Hour Advisory Memorandum No. 2005-1 (December 1, 2005).

Amicus further submits that the home care community considers the entire section 552 to be the absolute and binding rule related to wage and hour laws affecting companionship services. Constituent members of Amicus have structured their business operations around this rule, as home care is a business that is based on labor rather than materials. Compensation levels, work scheduling, price ~~setting, and~~ staff size and composition are built around compliance within federal wage and hour laws under the FLSA.[4] Failure to respect the comprehensive rulemaking process utilized in promulgating 552.109 will lead to "protracted confusion" with the FLSA and any other federal agency action that involves rulemaking. *United States v. Mead*, 533 US at 245 (2001) (Scalia dissent).

State legislatures and labor departments appear to have considered section 552.109 to be binding as well. In response, several expressed their prerogative and have eliminated or modified the exemption. *See, e.g.*, MCL 408.394 Section 14(2)(a) (Michigan Codified Law).

All indications are that section 552.109 was originally and continually intended as binding by the Secretary. This Court should recognize the same and do honor to the extensive rulemaking process utilized by the Secretary over more than 30 years. The judiciary should not substitute its view of the law when this process is

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[4] The Court of Appeal references no evidence that the Secretary ever considered 552.109 as anything but legally binding. *Northwest Ecosystem Alliance, et al v. US Fish and Wildlife Service*, No. 04-35860 (9th Cir. 2007) (Policy statement given Chevron deference even though it was not formulated through notice-and-comment rulemaking or adjudication).

utilized by a federal agency except where the outcome is clearly erroneous. *Auer v. Robbins*, 519 US at 461 (1997) *citing, Robertson v. Methow Valley Citizens Council*, 490 US 332, 359 (1989).

2. Section 552.109 Achieves the Goals of The FLSA Companionship Services Exemption.

Aside from the unambiguous language of 29 U.S.C. §213(a)(15) and the appropriateness of deference to the Secretary's regulatory implementation, 29 C.F.R. §552.109 is a reasonable and rational approach to achieve the goals of the companionship services exemption. By focusing on the infirm and elderly in enacting a companionship services exemption, Congress targets our nation's most vulnerable population. Improving opportunities for the elderly and disabled to remain in their own homes, with their families, avoiding more costly institutional care is the central purpose behind the exemption. *See* 118 Cong. Rec. 24715 (July 20, 1972) (statement of Senator Taft) (noting that certain domestic services are directed to caring for the elderly in their homes and avoiding nursing home placement); 119 Cong. Rec. 24801 (July 19, 1973) (statement of Senator Burdick) (indicating the exemption relates to aged or infirm fathers and mothers who need someone "to take care of them.")

The Secretary's construction of 29 U.S.C. §213(a)(15) supports the goals of caring for the infirm or aged in their own homes. Those goals are not achieved with limits on the nature and identity of the employer. Meeting that need for care should not be impeded by irrational distinctions between caregivers that are employed by the person in the home and those employed by third parties. The point of the companionship services exemption is to assist the infirm and elderly in getting

care because Congress recognized their special needs. This provision is designed to protect the consumer from high costs, not to protect the employer from higher wage obligations.

The Court of Appeals itself recognizes that the companionship services exemption is intended to help make home care for the elderly and infirm more affordable. Pet. Ap. 5a. With this finding, the Secretary's interpretation is certainly "permissible," *Barnhart v. Wilson*, 535 US at 219 (2002) (the interpretation makes considerable sense in term's of the statute's basic objectives) and, at a minimum, meets any "power to persuade" test under *Skidmore v. Swift & Co.*, 323 US 134, 140 (1944); *United States v. Mead*, 533 US at 228 (2001).

It is the care that matters in section 213(a)(15), not the employer. It is for that reason that the Secretary designed 29 C.F.R. Part 552 to "define and delimit" the companionship services exemption so that it applies to employment involving personal care services with minimal allowance for housekeeping (a subset of domestic services) in the home of the person receiving care (not in institutional care settings) and limited to the elderly and disabled ("because of age or infirmity"). To add a qualification limiting the nature of the employer fails to serve the purpose of the exemption.

The Secretary's construction of section 213(a)(15) also avoids the very troubling discriminatory result if this exemption applies only to directly-employed caregivers. While the exemption clearly applies to care for person "unable to care for themselves," the Court of Appeals essentially determined that the exemption is only available when the person unable to care for himself is sufficiently able to take on the daunting tasks required of an employer. That dichotomy stretches the reasoning of the Court of Appeals to an irrational breaking point.

While certain recordkeeping tasks, *e.g.*, 29 C.F.R. §516.34, may not apply, the most taxing responsibilities such as recruitment, training, supervision, and quality control remain for a person "unable to care themselves."

Such discrimination would be at odds with repeated efforts by Congress and the Executive Branch to end disability-based barriers. These efforts include: the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §12101fff. The ADA also includes a mandate in favor as community-based care that complements the goals of the FLSA companionship services exemption. *See, Olmstead v. L.C.*, 527 U.S. 581 (1999).

Congress included no language in 29 U.S.C. §213(a)(15) that supports the proposition that it intended to limit relief from minimum wage and overtime compensation obligation only to those who are mentally and physically able and willing to assume the difficult role of caregiver employer. Instead, it is apparent that Congress intended to offer protection to this vulnerable class as a whole regardless of the nature of the caregiver employer. Section 552.109(a) appropriately carries out this mission.

CONCLUSION

NAHC urges this court to reverse the decision below.

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Respectfully Submitted,

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